

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:HMT: [REDACTED] POSTF-124241-02
[REDACTED]

date: May 15, 2002

to: [REDACTED], Team Manager, [REDACTED]

from: Associate Area Counsel,
LMSB, [REDACTED]

subject: [REDACTED]
**Resolving Post-Notice Years
Early Referral to Appeals**

This memorandum responds to your request for assistance dated April 30, 2002. This memorandum should not be cited as precedent.

Issues

Is the examination branch required to make an early referral of an issue to the IRS Appeals division upon a taxpayer request?

Is the examination branch required to submit an issue to the IRS Appeals for fast track mediation upon a taxpayer request?

Can the examination branch issue a notice of deficiency for the remaining years currently under examination after receiving a request from the taxpayer for IRS Appeals involvement of the matter? Would this action violate any Code provision, regulation or policy of the IRS?

Conclusions

The recently developed programs involving Appeals Fast-Track dispute resolution require an agreement by both the taxpayer and the examination division to submit an issue or issues to the Appeals division. In the absence of such an agreement, no early referral to Appeals is allowed. If you decide that submitting this issue to Appeals is not appropriate or desirable, then you may exercise your discretion and retain jurisdiction of the issues, or you may send the taxpayers a notice of deficiency. Neither the Code nor any other authority requires that you do so. The same is true for a request for mediation. You can decide if the issue is appropriate for Appeals mediation.

The examination branch may issue a notice of deficiency to the taxpayers in this case. Issuing the notice of deficiency would not violate any Code provision, regulation or policy of the IRS.

Background

[REDACTED]. The [REDACTED] Corp. [REDACTED] is an S Corporation (non-TEFRA). The [REDACTED] use a February 28 year end. The [REDACTED] have [REDACTED] shareholders, [REDACTED] shareholders, and [REDACTED] taxable trusts [REDACTED] as shareholders. All the shareholders have a December 31 year end. The [REDACTED] are a CEP, now CIC, taxpayer subject to specific examination procedures. [REDACTED] [REDACTED]. All the shareholders are SB/SE taxpayers.

One issue dominates all three years of the [REDACTED] current examination cycle, [REDACTED]. The final two years of the cycle have two additional (relatively minor) issues. [REDACTED] [REDACTED]. The first year of the cycle involves the [REDACTED] February 28, [REDACTED] year end and the December 31, [REDACTED], year end tax returns of the shareholders.

Earlier this year, you requested that the individual shareholders extend the statute of limitations for the first year (December 31, [REDACTED] year end). Your request was denied. Because the statute of limitations for this year was set to expire on [REDACTED] you had to issue the notice of deficiency or abandon the issue. You issued the notice. Because you had insufficient time to do so, you did not issue any 30 day letter in this case. You anticipate most if not all the shareholders will file a petition with the Tax Court.

The representative for one group of shareholders (the [REDACTED]) orally requested that you make an early referral of the subsequent years (corporate years ended February 28, [REDACTED], and February 29, [REDACTED]) to the IRS Appeals office. The representative has also orally requested mediation of the issue. You note that this is the same representative who shared with you his advice to his clients that they not extend the statute of limitations for the [REDACTED] year. Apparently, he wanted Appeals to be involved only after the first year was docketed in the Tax Court. The statute of limitations for the shareholders' [REDACTED] and [REDACTED] years will expire on [REDACTED], and [REDACTED] respectively.

You also note that while most, or all, of the ████████ corporate officers are attorneys, the ████████ have not requested fast-track resolution or mediation of this issue. The oral request has been made by the representative of a few shareholders.

Analysis

We believe the statutes and other authorities provide you with the discretion to submit, or not to submit, this case to Appeals for fast-track resolution. Consequently, you may exercise your discretion in deciding how to resolve this case. Your exercise of this discretion would not be a violation of the Code, regulations, or policies of the IRS.

Section 7123 of the Internal Revenue Code (IRC), as added by Section 3465 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub L. No. 105-206, 112 Stat. 685, provides that the Secretary shall prescribe procedures by which any taxpayer may request an early referral to the IRS Appeals office. The same code section also provides that the Secretary shall provide mediation provisions to resolve taxpayer disputes. Under these provisions, a taxpayer may request early referral to Appeals of any undeveloped, unagreed issue being developed by exam in any audit, change in accounting method, or employment tax issue. Early referral is a process which is intended to resolve cases more expeditiously because exam and Appeals are working on a case simultaneously.

Revenue Procedure 99-28 describes how a taxpayer may request early referral to Appeals. This procedure provides that if exam and the taxpayer are unable to resolve an issue, the taxpayer may pursue an administrative appeal either by requesting an Early Referral to Appeals or by protesting any proposed deficiency related to the issue. Revenue Procedure 99-28 allows the taxpayer to request early referral of any developed, unagreed issue under its jurisdiction. Exam will continue to develop issues that have not been referred to Appeals. This revenue procedure does not alter the examination division's authority to audit the returns of a taxpayer as to other issues nor limit or expand exam's authority to resolve any other issues.

Under this revenue procedure, both the taxpayer and the District must agree to the early referral to Appeals. Neither the statute nor the revenue procedure identifies what the exam division should consider in determining whether or not to submit the issue to Appeals for resolution.

The revenue procedure makes clear that some issues are

excluded from early referral. Early referral does not include an issue (1) with respect to which a 30-day letter has been issued; (2) that is not fully developed; (3) when the remaining issues in the case are expected to be completed before Appeals could resolve the early referral issue; (4) that is designated for litigation by the Office of Chief Counsel; (5) for which the taxpayer has filed a request for Competent Authority assistance, or issues for which the taxpayer intends to seek Competent Authority assistance; or (6) that is part of a whipsaw transaction.

A request for early referral must be submitted in writing by the taxpayer to the case/group manager. The case/group manager may suggest that a taxpayer make such a request. If either the district or Appeals, or both, deny the request, it will be returned to the CEP case manager who will inform the taxpayer of the denial. There is no formal appeal procedure but the taxpayer can request a conference to discuss the denial of an early referral request. Generally, the taxpayer should be advised of whether the request has been denied or approved within 45 days of the date the CEP case manager received the request from the taxpayer.

You have advised that you do not want to send the case to appeals for early referral. You point out that the representative who wants the [REDACTED] and [REDACTED] years sent to Appeals under the early referral program refused to send the [REDACTED] year -- which had the exact same issue -- to Appeals. Instead, the representative compelled you issue the notice of deficiency for the [REDACTED] year. Under these circumstances, a reasonable person could conclude that the representative seeks to manipulate the processing of these cases. Perhaps, to take to trial the first year which would then be standing alone. Your case would be strengthened if you place all three years in the same posture.

We note that under the revenue procedure, both the taxpayer and exam must agree to the early referral to Appeals. In the absence of a mutual agreement, the case cannot be submitted to appeals under this program.

This case is not specifically excluded by any of the six categories of cases identified in the revenue procedure. Nevertheless, we believe that if the procedure disqualifies an issue from early referral because a 30 day letter has been issued, it would also disqualify an issue for which a notice of deficiency has been issued. We note that the remaining issues in the case are relatively minor compared to the unreported income [REDACTED]. The remaining issues in the case are expected to be completed long before Appeals could resolve the

early referral issue. In fact, you are prepared to issue the notice of deficiency for the later years very soon.

We also note that the attorney represents only a few of the shareholders -- he does not represent [REDACTED]. Your examination involves unreported income of [REDACTED] an S Corporation. The shareholders pick up the income as a flow-through item on their tax return. A request for Appeals consideration should come from [REDACTED], not the shareholders. We do not know how many of the shareholders would want Appeals fast-track consideration or mediation of the issue. The request has been made orally. The representative has not submitted any request in writing. You are not required to act on any oral request. Our endorsement of your proposed actions would still apply even if the representative makes a written request for the early referral.

You are permitted to issue a notice of deficiency for the [REDACTED] and [REDACTED] years. Section 6212 of the Code provides, in summary, that if exam determines the taxpayer has a tax deficiency, the Secretary is authorized to send the taxpayer a notice of deficiency. You have not indicated whether you will issue a 30 day letter to the taxpayer for the [REDACTED] or [REDACTED] years. (You advised that no 30 day letter was issued for the [REDACTED] year because you had insufficient time to do so). While the Service has a preference for issuing 30 day letters before issuing notices of deficiencies, you are not required by the Code, regulations or by policy to do so. You may issue a notice of deficiency for the [REDACTED] and [REDACTED] years without first issuing a 30 day letter, even if sufficient time exists to issue a 30 day letter.

Conclusion.

You are not required to submit the issue to Appeals under the new programs for fast-track dispute resolution or mediation. Those programs require the agreement by both the taxpayer and the examination branch to seek resolution of the issue in this way. If the examination branch decides that submitting the issue to Appeals is not appropriate, then neither the statute nor any other authority requires that the matter be submitted to Appeals. We are unaware of any violation of the Code, regulations, or policies of the IRS as a result of your decision to not submit the case to Appeals pursuant to the taxpayer's request.

Should you have any questions about this matter, please contact [REDACTED] at [REDACTED]

This writing may contain privileged information. Any

unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

[REDACTED]
Associate Area Counsel
(Large and Mid-Size Business)

By: _____
[REDACTED]
Senior Attorney (LMSB)